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In the Supreme Court of the United States

No. 972

ALBERT ROBERTS, JR.,

Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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(emphasis added, except where otherwise noted)

Point I.

The Respondent in many instances in its statement of the case and all through its brief in opposition to the petition for Writ of Certiorari, has apparently so misconceived the actual facts in the case that the Petitioner can not, by remaining silent, leave any implication that such statements are in any manner the true facts in the case. For instance, on page 2 of the brief the Respondent makes this statement of facts:

> "The Board of Public Instruction objected to claims Numbered 52 and 54, filed by the corpora-

> tion and its Vice-President, upon the grounds that both claims involved bonds and coupons which could not be refunded under the Plan of Composition (R 58/60-A) and further objected to the allowance of claim No. 54, in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr., and the taxing division submitted positive proof to this effect, and proved to the satisfaction of the Special Master (R 235/241 B) and the Court (R 306 B and R 394 B) that the Vice-President had split the claims in order to create an artificial and technical issue."

Our construction of the record does not bear this out. An objection was made to *part* of claim No. 54 on the grounds that some of the bonds were claimed to be illegal by the taxing unit. As a matter of fact, the complete written objection to that claim appears on page 58 of the record—(58-A). That objection, insofar as it refers to the particular coupons, reads as follows:

> "The Board of Public Instruction for the County of Broward, State of Florida, Petitioner in these proceedings, hereby files objections to allowance of the claim filed by Albert Roberts, Jr., on Aug. 14, 1939, *in so far as same applies to coupons detached from Bonds Nos. 66 to 78 inclusive* of the issue of 10/1/27, and interest thereon upon the following grounds, to-wit:" (emphasis added) (R 58-A)

But Respondent is entirely mistaken when he states on page 3 of his brief that it

> "Further objected to the allowance of claim No.

54 in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Co., and not to the Vice-President."

We submit that no such objection was ever made. The only objection ever interposed by the Petitioner was the objection appearing on page 58 of the first record (R 58-A) and quoted above. Moreover, on the first day of the proceeding the claims were again scrutinized by the attorney for the Board and no objection on this point was interposed at that time. Thus, on page 95-B, the following colloqui appears:

"Mr. Ross:

Taking up those claims from the back order there, I would like to move that we go along, which is our right, under the bankruptcy law, if the petitioner does not object to the allowance of claims they are automatically allowed at the hearing, that is in the bankruptcy law. I would like to call those claims out by number and move for allowance and disallowance, and you can note on the side what is done of each one of those claims in the order named.

"Mr. Warren:

Isn't that unnecessary? If you are not going to object to them you admit them, don't you?

"Mr. Ross:

Alright then, I will pick out the ones I object to.

"The Master:

They can then be admitted except those you object to, and you can take those up separately."

Thereupon, each of the claims was taken up and examined by the Board, and when the attorney came to

the claim of Albert Roberts, Jr., in the sum of $12,510.00, the Petitioner herein, this objection was interposed (P. 98-B):

> "Now, as to claim No. 54 filed by Albert Roberts, Jr., I suggest that same be disallowed *as to $5,070.00 of coupons of the 10-1-27 issue*, which are coupons detached from the same bonds which are involved in the Turner suit." (emphasis added)

Roberts' claim was for the total sum of $12,510.00 (R 62-63-B), the only part of that total amount objected to was the sum of $5,070.00 as stated above. The other part of the claim in the sum of $7,440.00 was specifically allowed by the master and the court concurred in the allowance (R 394-B). The board never objected to the claim of Roberts on the ground that the coupons were owned by Ed. C. Wright & Co. It is true that, after the claim was allowed, the board produced the testimony showing Roberts' appearance before it in 1938 in connection with a plan of refunding, and showed Roberts' conversations with the fiscal agent prior to the proceedings in bankruptcy, but even during this testimony the board never asked that Roberts' claim be re-examined or re-opened, and to the very end of the case the claim stood as an allowed claim. Thus, under the usual and accepted procedure of bankruptcy, the board should have asked that the Roberts claim be reconsidered and rejected. The Bankruptcy Act is specific on this point. It states, Section 57 (k):

> "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

The testimony relating to Roberts' particular meeting with the Board in 1938 is herein outlined:

"Q. Can you name some of your creditors represented by claims filed here who have appeared before your School Board?

A. Well, I remember that one time Dick Lyman was here and discussed this matter. He is connected I believe with Broward County Bond Owners' Association, and at one time there was a special meeting of the Board called for the purpose of discussing this matter with Mr. Roberts I think, representing Ed. Wright and Company in St. Petersburg.

Q. Is that the same Mr. Albert Roberts, Jr., who has filed proof of claim No. 54?

A. Albert Roberts, Jr.

Q. And your Board discussed with Mr. Roberts a plan of composition of this debt?

A. In a special meeting of the Board called for that purpose.

Q. Do you have the minutes and records of that meeting?

A. Yes, I think they are here. It was on *April 20, 1938*. It followed some correspondence with Mr. Roberts.

Q. Could you have prepared a copy of those minutes to be substituted here in the record relative to Mr. Roberts' appearing before your board?

A. Yes.

Mr. Ross:

Then I would like to tender that portion of the minutes of April 20, *1938* shown on Page No. 2159

of Minute Book 8 with leave to substitute certified copy of that portion.

Mr. Warren:

No objection.

The Master:

Received and filed in evidence with leave to substitute copy as Petitioner's Exhibit 8.

(Said original was admitted in evidence and withdrawn and copy of excerpt was marked Petitioner's Exhibit No. 8).

Mr. Ross:

Q. In what capacity did Mr. Roberts appear there, who was he representing?

A. Vice President of the Ed. C. Wright Co., of St. Petersburg.

Q. That is the same Ed. C. Wright & Co., which has filed proofs of claim Nos. 52 and 53, is that right?

A. As far as I know.

Q. Did he talk in relation to any particular bonds at that particular time?

A. No, not that I remember. He said they held some bonds over there that they would like to get settled some way.

Q. Did he make any particular reference at that time to the suit of R. E. George?

A. No, I don't remember that he did.

Q. He never made any reference to that suit?

A. No.

Q. But you state that he did discuss with you this matter of trying to work out this indebtedness?

A. Yes, the minutes show that there was a special meeting held at his suggestion for that purpose."

The court will, of course, bear in mind that this meeting was had in 1938, long prior to any proceeding in bankruptcy. Without attempting to quote all the testimony relating to the Petitioner, it is completely set out on page 146 to 157—R 146/157-B. None of it denied the ownership in Roberts of his coupons which had been allowed. Even the fiscal agent testified as follows (R 156-B):

"Q. I believe you stated you had talked to Albert Roberts and at the time you talked to him he was speaking as the representative of Ed. C. Wright & Co.

A. He was speaking as the representative of Ed. C. Wright & Co., *and I don't know what other capacity he was speaking in.*

Q. He didn't at that time indicate that he owned any of the coupons or any of the bonds to be affected by the plan?

A. I will state again I couldn't give his exact words, but I most certainly understood that he could only speak as a member of the firm of Ed. C. Wright & Co. and had to go to his superior officer, Mr. Wright, before he could give any answer.

Q. And at the time you were talking to him, was that after this plan had been adopted, the plan was adopted May 2d?

A. Yes, after the plan had been adopted.

Q. And at the time you were talking to him it was after this George suit was filed on May 11, 1938, a year ago?

A. Yes.

The Master:

Were the coupons covered by the Roberts proof of claim included in the George suit?

Witness:

A. Yes.

Q. Suit was instituted in the Circuit Court here for a judgment upon default of coupons and bonds?

A. Yes.

Q. And those coupons —

A. — Mandamus —

Q. Mandamus, — And those coupons were included in the George suit?

A. Yes.

Q. Upon which Roberts has filed a proof of claim?

A. Yes.

Q. Who is George?

A. I don't know, but in discussing *with Roberts, he acknowledged that those were his bonds that were filed in the George case, that he owned or controlled them."* (emphasis added)

It will be observed that this bankruptcy proceeding was filed on June 16, 1939. The proof of claim of the Petitioner is directly in his own name. It was never signed as Vice-President of Ed. C. Wright & Co. To presume that the coupons belong to Ed. C. Wright & Co. in the face of the Petitioner's uncontradicted and

uncontroverted sworn proof of claim, to which no objection had been interposed and which claim had been specifically allowed by the master—regardless of the former connections of Albert Roberts, Jr. with the company, particularly when the finding came after the case was closed, certainly denied Albert Roberts, Jr. his property without due process of law. As a matter of fact, he was President of his own company, Roberts & Co. at that time and was not an officer of Ed. C. Wright & Co. There was no occasion for him to take the stand and show to the court that he was no longer connected with Ed. C. Wright & Co.; that he was in competition with Ed. C. Wright & Co. at the time of the institution of the proceeding; that he paid value for the coupons. All of those matters were entirely unnecessary. The master had allowed the claim, and under the ordinary concepts of bankruptcy proceedings the Petitioner's connection with Ed. C. Wright & Co. was immaterial and irrelevant, and there was no occasion for him to take the stand and rebut an issue which the master had previously determined as immaterial. We recognize, however, that if the master had called upon Albert Roberts, Jr. during the proceedings on a reconsideration of his claim to establish the bona fides of his claim or else it would be disallowed, the situation might be entirely different, but to let him rest upon the allowance of his claim until after the case was over, during the whole time of which time his claim stood in part as an allowed claim, and then to condemn him (after the case is closed) for not putting on testimony to establish the bona fides of its acquisition certainly deprived him of his property without an opportunity of being heard.

We do not find the facts in the case to justify the statement made on page 4 of the Respondent's brief as follows:

> "At the request of the claimant, Albert Roberts, Jr. (R 175 B), the hearing was adjourned for one week to permit the claimant to present evidence and substantiate his claim."

Of course, there was no occasion for Albert Roberts, Jr. to ask for an adjournment for a week to establish his claim. It had been allowed (except as to the $5,-070.00 item) and it had not been objected to. The Respondent is mistaken when it states that the continuance was asked for the purpose of establishing his claim. The record does not so show. The record reads as follows (R 175-B):

> "Mr. Warren:
>
> If the Court please, I don't know just how much I will want to put in and it may come about that there will be very little, but I would like to have an adjourned meeting, and I will let the Court know within a week or ten days, as to what we will want to do.
>
> The Master:
>
> There will be an adjournment until 10 A.M. November 24th, to be held in the BPI office."

Point II.

The Petitioner again contends that the American United Life Ins. Co. v. City of Avon Park, Fla., 61 Sup. Ct. Rep. 57, 85 L.ed. 112, is clearly on point.

The plan was on its face that holders of interest coupons would be discriminated against. It would have been a very simple matter for the master to recommend that the plan be modified so that all creditors take a straight percentage cut in their securities, regardless of how evidenced, and thus every creditor, regardless of how the claims are held, would take the same pro rata part of the assets of the taxing unit, and no one would have been discriminated against.

Point III.

The Respondent has clearly misconceived the legal effect of the decisions of the Supreme Court approving the refunding bonds issued pursuant to the plan of composition (quoted in Respondent's brief, page 15). No contention is made that the bonds are invalid; as a matter of fact, nothing was stated in the validation proceedings concerning the hidden refunding agent's fees in the funds set up for bondholders. That part of the plan was never passed upon by the Supreme Court of Florida. The bonds in the cases of Taylor v. Williams were also declared valid, but the Supreme Court held that the funds set up for those bondholders could not be used for refunding expenses as is attempted in this case. This was particularly pointed out in the case of State v. City of Ft. Myers, 198 So. 814. The Supreme Court of Florida validated the bonds, but particularly pointed out that a taxpayer might have a remedy if the refunding fees were paid from funds set up for bondholders. Obviously, this part of the plan was not and can not be passed upon by the Supreme Court of the State of Florida. The sole point raised in the validation proceedings was the validity of the bonds. We do not claim that the refunding bonds can be en-

joined, but we do claim that a homestead taxpayer can at this moment enjoin the district from levying any taxes against his property to pay the fees of the fiscal agent, which under the plan are hidden in the funds set up for the bondholders. The scheme of refunding is unique to say the least, but actually its costs are being assessed against the taxpayers in such a way as is clearly contrary to the Constitution of the State of Florida. The cost of the refunding is an *operating* expense, and it can never be hidden in the sinking fund for bondholders and then paid by the Board from that fund over a period of years.

We entirely disagree with the Respondent when it claims that the case of Barrow v. Moffett, 95 Fla. 111, 116 So. 71 has been overruled. We do not understand the law to be as claimed. For instance, in the case of State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602, the Supreme Court did not overrule Barrow v. Moffett, but distinguished the facts in the case, the court there saying:

> "The case at bar may be distinguished from the foregoing cases. Barrow v. Moffett involved the interpretation of Chapter 12844, Special Acts of 1927, and while the opinion might be clearer on that point, the Act was held invalid on the theory that it authorized the issuance of bonds for paying teacher's salaries and other current expense of the public schools that should have been contemplated and paid from the annual tax levy for county school purposes, as provided by Sections 8 and 9 of Article 12 of the Constitution."

The case of State v. Board of Public Instruction for Manatee County, 139 Fla. 519, 190 So. 686, was also a

case which distinguished Barrow v. Moffett. In that case the court pointed out:

> "Counsel for intervening taxpayers admit that the court below was correct in its ruling on all the questions raised, but the second, which was in effect that the refunding bonds were invalid because they were in violation of sections eight and nine, article twelve of the constitution of Florida. To support this contention, they rely on Barrow v. Moffett, 95 Fla. 111, 116 So. 71; Board of Public Instruction of Lafayette County v. Union School Furnishing Co., 100 Fla. 326, 129 So. 824; Leonard v. Franklin, 84 Fla. 402, 93 So. 688; and State v. Board of Public Instruction for Indian River County, 98 Fla. 1152, 125 So. 357.
>
> "The pith of their contention on this point is that the cases just cited inhibit the issue of bonds to pay past due indebtedness of boards of public instruction incurred for operating expenses. Such expenses, they contend, must be paid as they mature from the proceeds derived under section eight and nine, article twelve, Constitution of Florida.
>
> "The acts authorizing the original bonds merely state that they were to pay outstanding indebtedness of the Board of Public Instruction. The character of the indebtedness is not revealed, but against the validating decree in the first instance and the refusal of the court below to deny validation we must refuse to decree them in violation of the constitution. State v. Board of Public Instruction of Dade County, supra, appears to be a complete answer to this question."

In Board of Public Instruction v. Gillespie, 81 F (2d) 586, the Board contended that:

> "The county boards contend that chapter 13072 and 13296 under which the bonds were issued and all the proceedings taken about their issuance and the bonds themselves are invalid, because the act conflicts with, and is repugnant to, sections 8, 9, of article 12, Florida State Constitution. As authority for this position they cite and invoke Barrow v. Moffett, 95 Fla. 111, 116 So. 71, decided February 1, 1928, which in a validating proceeding as to bonds to be issued by the board of public instruction of Highlands county held this as to a precisely similar act, chapter 12844, Sp. Acts of 1927, and denied validation."

The court did not overrule the Barrow v. Moffett case, but merely stated that at the time the bonds were issued and at the time they went into the hands of innocent purchasers, the Supreme Court of Florida had not judicially declared the implied limitation on the power of the legislature as announced in the Barrow case, the court saying:

> "It will serve no useful purpose for us to attempt an analysis of the Florida decisions as they existed before the bonds were issued and as they exist now. It will suffice to say of them that in our opinion, when these bonds were issued, the Supreme Court of Florida had not discovered in the Constitution and judicially declared the implied limitation on the power of the Legislature announced in the Barrow case."

In each of the cases referred to and quoted by the Respondent, the bonds had actually been placed upon the market in the hands of bona fide purchasers, and the sole question was whether or not a judgment should be rendered against the board on the bonds, or whether

the bonds could be validated into refunding bonds. The case of Barrow v. Moffett was a proceeding for the issuance of original bonds, just as the present case is for the payment of fees incurred in these proceedings. The bonds never got in the market and in the hands of innocent purchasers. Consequently, the decision in the case, which is regarded as the clear law in the State of Florida, is directly on all fours with the contention of the Petitioner—that the plan is clearly illegal and contrary to the decisions of the State of Florida announced in Barrow v. Moffett.

Point IV.

We again reiterate that the master was clearly in error in ruling that the plea of res adjudicata was established by placing the judgment in evidence without the complete record. The Respondent has failed to answer the cases rendered in the State of Florida directly on point with the contention of the Petitioner in this case.

Conclusion

In conclusion, Petitioner respectfully submits that it is entitled to a Writ of Certiorari to review the action of the lower court; that there has been such a departure from the usual and accepted custom of judicial proceedings in the lower court as to completely deny him his property without due process of law; that under every case cited the "fiscal agency" scheme is illegal and void under the decisions of the Supreme Court of the State of Florida; that the decisions of the Supreme Court of the State of Florida are binding upon the Federal Courts in Bankruptcy in determining, on an allowance or objection to a claim, whether or not the final

judgment without the complete record is sufficient to substantiate such plea of res adjudicata.

We, therefore, respectfully submit that this court should exercise its power of supervision and correct the proceedings in this case.

Respectfully submitted,

.....

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